No. 75-657

IN THE

Supreme Court of the United States

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October Term, 1975

LOCAL 3489, UNITED STEELWORKERS OF AMERICA, AFL-CIO and UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioners,

v.

PETER J. BRENNAN, SECRETARY OF LABOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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LOCAL 3489, UNITED STEELWORKERS OF AMERICA, AFL-CIO and UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioners,

v.

PETER J. BRENNAN, SECRETARY OF LABOR, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Local 3489, United Steelworkers of America, AFL-CIO and United Steelworkers of America, AFL-CIO pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 520 F.2d 516 and is reproduced in the Appendix to this petition at App. 1a-15a.[1] The opinion of the district court is unreported and is reproduced in the Appendix to this petition at App. 17a-22a.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1975 (App. 16a). This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a union's rule requiring that a candidate for local union office have attended half (½) the regular monthly meetings held in the three years preceding nominations is a "reasonable qualification" for candidacy within the meaning of the Labor Management Reporting and Disclosure Act of 1959, where attendance is not difficult for any member and any member may qualify simply by devoting two hours every other month to union affairs.

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1. The Appendix to this petition is separately paginated and is referred to herein as "App."

STATUTE INVOLVED

The statute involved is the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. §401, *et seq.*, in particular, Section 401 of that Act, 29 U.S.C. §481 which, in relevant part, reads as follows:

"TERMS OF OFFICE; ELECTION PROCEDURES

* * *

"Sec. 401. (b) Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing.

* * *

"(e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. . . . The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title."

STATEMENT OF THE CASE

The Secretary of Labor and the United Steelworkers of America, AFL-CIO (herein called "Steelworkers") have been engaged in continuous litigation over the validity of the Steelworkers' meeting attendance rule ever since the 1967 elections for local union officers. With each new round of Steelworker Local elections — more than five thousand conducted every three years — a spate of new lawsuits emerges. The present action, involving Steelworker Local 3489, is part of the crop which grew out of the 1970 elections.

The case began when, following the June 22, 1970 election of local union officers and after exhausting internal union remedies, one of two defeated candidates for president of the Local, though himself eligible, filed a complaint with the Secretary of Labor asserting, *inter alia,* that the meeting attendance rule was unreasonable.[2] Thereafter and within the time permitted by the statute, the Secretary instituted this action against Local Union 3489 under Title IV of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA) seeking to set aside the June 22, 1970 election. The complaint alleged that the election was void because the Local had applied the meeting attendance rule and because of a "secret ballot" violation, not material here. The Steelworkers, as parent international union, intervened as a party defendant.

The membership of Local Union 3489 is composed of production and maintenance employees of the Stran

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2. In 1973, the complainant won the presidency of Local 3489 in an election conducted under the Steelworkers' meeting attendance rule (App. 3a).

Steel Corporation in Terre Haute, Indiana. At the time of the June, 1970 election, there were approximately 660 members employed at the plant (App. 2a). The Local's meetings were held in a union hall located three miles and within a ten-minute automobile ride from the plant. In conducting the election, Local 3489 applied an eligibility requirement prescribed by the Steelworkers' constitution and applicable to all Steelworker Locals. Under that requirement, no member is eligible to hold local union office unless:

> "He has attended at least one-half (½) of the regular meetings of his Local Union for thirty-six (36) months previous to the *** election, unless his Union activities or working hours prevented his attendance" (App. 19a).

There were twenty-three members in the Local who were eligible to hold office. Of these twenty-three, less than half were incumbent officers. Two nominees were informed that they were ineligible because they had not attended a sufficient number of union meetings. Six former officers won reelection either to the same or some other office. Non-incumbents were elected to the important offices of Vice President, Recording Secretary and Treasurer and to one minor office.

Upon a largely stipulated record, the district court held that the Steelworkers' meeting attendance rule was a reasonable qualification for holding office within the meaning of §401(e) of the LMRDA. In doing so, it agreed with four district courts and with a decision of the United States Court of Appeals for the Sixth Circuit. Without exception, all had declared the Steelworkers' meeting attendance rule a reasonable requirement under the statute. The district court readily distinguished

REASONS FOR GRANTING THE WRIT

The candidate qualification issue involved in this case raises a question of national importance in the administration of LMRDA on which this Court previously granted certiorari in *Hodgson* v. *Local 6799, United Steelworkers of America,* 403 U.S. 333 (1971) but did not decide there because of its holding on the threshold issue of exhaustion under the Act. A conflict over the candidacy issue has now developed between the circuits. Thus, the Seventh Circuit's instant opinion with respect to the Steelworkers' meeting attendance rule is directly contrary to the Sixth Circuit's decision in *Brennan* v. *Local 5724, United Steelworkers of America,* 489 F.2d 884 (6th Cir. 1973). Moreover, this division reflects a fundamental difference over the application of the election provisions of the Act and over the meaning of this Court's decision in *Wirtz* v. *Hotel, Motel & Club Employees, Local 6,* 391 U.S. 492 (1968). We briefly expand on these points below.

The Steelworkers' meeting attendance candidate eligibility requirement is imposed by the International's constitution on each of its 5,200 Locals. The rule is thus national in scope and reaches approximately 1,400,000 Steelworker members. Meeting attendance rules are not unique to the Steelworkers, however. Indeed constitutions of international unions having twenty-five per cent of all of America's union members impose meeting attendance requirements as a candidacy qualification for local union office and countless local unions who have been left the option by their international are likely to have adopted such a requirement on their own. The Secretary of Labor himself has in the past urged this Court to decide the substantive issue raised by the meeting attendance qualification "[b]ecause of its national importance in the administration of the Act . . ." and because it involves basic principles under the Act.[4]

The rule in its present form was first applied in the 1967 Steelworker local union elections. It has since become the largest single source of litigation under the Act. Moreover, given the Secretary's case-by-case approach, and now that there is one decision which finds the rule invalid, it is reasonable to expect a deluge of lawsuits to descend upon the courts after the 5,200 upcoming Steelworker local union elections.

In early 1968, the Secretary instituted eight separate lawsuits in cases growing out of the 1967 elections. In each he injected a challenge to the meeting attendance rule, even where no member had protested the rule internally. Accordingly, when the meeting attendance rule first came before this Court in *Local 6799,* it came not alone but with another important issue—exhaustion. Moreover, once this Court ruled that exhaustion requirements barred the Secretary from litigating the matter, it had no reason to reach the question of the reasonableness of the rule itself. 403 U.S. at 341.

In the meantime, both before and after *Local 6799,* the courts which did reach the merits were unanimous in upholding the Steelworkers' meeting attendance qualification.[5] *Local 5724* was the first court of appeals case

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4. Pages 14-15 of the government's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed in *Hodgson* v. *Local 6799, United Steelworkers of America,* 403 U.S. 333 (1971).

5. *Brennan v. Local 5724, United Steelworkers of America,* 489 F.2d 884 (6th Cir. 1973); *Shultz v. Local Union 6799,* 71 LRRM 2820 (C.D. Cal. 1969), *aff'd on*

describing the matter.[6] The Secretary of Labor, however, did not seek certiorari from the Sixth Circuit's decision upholding the reasonableness of the rule but continued instead to litigate the issue in other cases including the present one.[7] Now, with the Seventh Circuit's decision, there is a direct conflict between circuits.

The Sixth Circuit, in declaring the meeting attendance requirement reasonable in *Local 5724,* looked to the real cause of the disqualification. Under the Steelworkers' rule, it was the member himself. To qualify, all any member had to do was devote about two hours to union affairs every other month—attending a regularly scheduled meeting in a union hall just a few minutes drive from the plant (App. 31a-32a). This stood in marked contrast to the restriction in *Hotel Employees* which limited eligibility to members who had previously held office. Under such a requirement, members who wanted to qualify were *prevented* from doing so.

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other grounds, 426 F.2d 969 (9th Cir. 1970), *aff'd sub nom., Hodgson v. Local 6799, United Steelworkers, of America,* 403 U.S. 333 (1971); *Shultz v. Local 1299, United Steelworkers of America,* 324 F.Supp. 750 (E.D. Mich. 1970), *aff'd in part, sub nom., Hodgson v. Local 1299, United Steelworkers of America,* 453 F.2d 565 (6th Cir. 1971); *Shultz v. Local 1150, United Steelworkers of America,* 75 LRRM 2869 (S.D. Ind. 1970), *vacated on other grounds* (No. 71-1467, 7th Cir. July 1971, unreported).

6. Two years earlier, the same circuit had turned down the Steelworkers' plea for a ruling on the merits. *Hodgson* v. *Local 1299, United Steelworkers of America,* 453 F.2d 565, 575 (6th Cir. 1971).

7. Another pending case is *Brennan* v. *Local 5702, United Steelworkers of America,* Civ. Act. No. 73-3272 (E.D. La.) where both parties have filed motions for summary judgment.

> "Unlike the *Hotel Employees'* bylaw, the Steelworkers' rule disqualified no one. Every member can qualify by the relatively unburdensome step of devoting a few hours per month to the affairs of his Union. Steelworkers disqualify themselves as a matter of free choice by their unwillingness to devote a few hours per month to Union affairs. . . . every member could have qualified merely by attending one-half of the meetings" (App. 33a).

Of course, if the rule was such that eligibility was beyond the members' control, as in the case of the *Hotel Employees* prior office holding requirement, *and* the rule's impact was to limit eligibility to a handful of candidates, then it would not pass muster under the Sixth Circuit's construction of the statute.[8] Put another way, as the Sixth Circuit reads *Hotel Employees,* that case does not establish a blind doctrine under which once a magic percentage of members is rendered ineligible, an otherwise valid eligibility requirement suddenly becomes unlawful even though the requirement serves legitimate union objectives and, by itself, disqualifies no one (App. 33a).

Unlike the Sixth Circuit in *Local 5724,* the Seventh Circuit in the present case, draws no distinction between rules under which members disqualify themselves by failing to take unburdensome steps, and rules under which eligibility is beyond the member's control. In the

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8. Statistical impact does not matter where eligibility is in the hands of the members themselves. Thus, in upholding the Steelworkers' rule, the Sixth Circuit assumed that as many as 93 per cent of the members were ineligible (App. 32a).

Seventh Circuit's view, *Hotel Employees* means that *any* rule which disqualifies 96.5 per cent of the local union's membership cannot be deemed a reasonable qualification under the statute.[9]

> "Later in the *Hotel Employees* opinion, Justice Brennan observed that because the objective of Title IV of the Act (29 U.S.C. §§481-483) is to insure free and democratic elections, it was plain that a candidacy limitation rendering 93% of union members ineligible for office 'can hardly be a reasonable qualification.' 391 U.S. at 502. Here the meeting attendance rule disqualified 96.5% of the Local Union's membership from office, so that it cannot be deemed a reasonable qualification either. We need not decide whether the 18 of 36 rule is *per se* unreasonable because its effect of severely restricting the number of potential candidates for union office shows it to be clearly unreasonable in this case.
>
> * * *
>
> "Of course, if a very high percentage of the membership is disqualified from seeking union office by a rule, as was the situation here, that fact alone may justify a finding that the rule is unreasonable" (App. 7a-8a).

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9. If, as the Seventh Circuit holds, percentages are determinative, the Steelworkers are confronted by an impossible administrative burden. There is no feasible way the union can establish in advance which of its 5,200 Locals may apply the rule and which may not. The adoption of an arbitrary minimum percentage eligibility figure will leave the Steelworkers no choice but to abandon the meeting attendance rule altogether at a sacrifice of the substantial values which it believes are served by the rule.

In addition to the fundamental difference described above, the Sixth Circuit and Seventh Circuits are also at odds over subsidiary issues. One such issue involves the purposes of the meeting attendance rule. The Sixth Circuit readily endorsed the trial court's factual finding that the rule was adopted for the following purposes:

> "'(1) To encourage broad base participation in the affairs of the union, and to obtain as large a turnout as possible at the meetings at which the union's business is conducted.
>
> '(2) To attempt to assure that candidates have demonstrated an interest in and are likely to be concerned with the problems of the union.
>
> '(3) To attempt to insure that candidates have participated in the affairs of the union and are, therefore, sufficiently familiar with its problems to be able more intelligently to fulfill the numerous responsibilities and duties attendant to holding office'" (App. 37a-38a).

The Seventh Circuit, though presented with similar findings by the trial court,[10] treated them as arguments rather than as findings of fact and rejected them on the ground that similar contentions had been rejected in *Hotel Employees*. The court of appeals further discounted the purposes of the rule, observing that based on facts in evidence, it would conclude that the rule had failed to

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10. "The meeting attendance qualification on the other hand is designed to (1) insure that candidates have demonstrated an interest in union affairs prior to election and are therefore likely to continue to do so, if elected, and (2) that candidates will, if elected, be able to more knowledgeably fulfill their duties" (App. 20a-21a).

achieve one of its goals, increased meeting attendance, and was *unnecessary* to *insure* another, competent union leadership (App. 11a).

The other matter which divided the circuits was the Secretary's interpretive manual. The Sixth Circuit concluded that the Secretary's position in the lawsuit was not consistent with the relevant provisions of his own published LMRDA interpretive manual in effect at the time the challenged election was conducted. That manual generally supported qualifications designed to assure that candidates had participated in union affairs and specifically sanctioned fifty per cent attendance requirements over one and two year periods. It was difficult for the Sixth Circuit "to see any significant difference for a meeting attendance requirement covering a period of three years. These regulations, although later amended by the Secretary, were in effect when the dispute here arose" (App. 35a).

The Seventh Circuit, however, was unpersuaded by this argument. The short answer, said that court, was that the manual was *now* obsolete, having been revised by the Secretary in 1973. In any event, the Steelworkers' three-year rule was fifty per cent harsher as to the number of meetings a member must attend and as to the time limitations imposed on his decision to seek office. A two-year rule, concluded the court, does not determine the reasonableness of a three-year rule (App. 9a-10a).

Needless to say, petitioners agree with the Sixth Circuit's application of the statute and with its analysis of this Court's opinion in *Hotel Employees*. We also agree with the decisions of those district courts which have actually passed upon the merits of the meeting attendance rule and in each case, found it a reasonable require-

ment.[11] But whether one sides with the Sixth Circuit or with the Seventh Circuit, all must agree that so long as the conflict between them remains unresolved, the Steelworkers, in administering 5,200 forthcoming local union elections and the Secretary of Labor, in administering the election provisions of the Act, both face an impossible dilemma.

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11. See cases cited in footnote 5. One district court, in *dictum* would have found the rule unreasonable. *Brennan* v. *Local 3911, United Steelworkers of America,* 372 F.Supp. 961 (N.D. Ill. 1973), cited with approval in *Brennan* v. *Local Union No. 639, International Brotherhood of Teamsters,* 494 F.2d 1092, 1099-1100 (D. C. Cir. 1974).

CONCLUSION

For the reasons set forth hereinabove, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 74-1639

PETER J. BRENNAN, Secretary of Labor,
Plaintiff-Appellant,

v.

LOCAL 3489, UNITED STEELWORKERS OF AMERICA, AFL-CIO, and UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana—No. TH 70 C 117
JAMES E. NOLAN, *Judge.*

HEARD APRIL 3, 1975—DECIDED AUGUST 5, 1975

Before CUMMINGS and PELL, Circuit Judges, and PERRY, Senior District Judge.*

CUMMINGS, Circuit Judge. The Secretary of Labor filed this action for declaratory and injunctive relief pursuant to Title IV of the Labor Management Reporting and Disclosure Act ("Act" or "LMRDA"), 29 U.S.C. § 401 *et seq.* The complaint alleged that a June 22, 1970, election of officers of defendant union[1] was void because

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*Senior District Judge J. Sam Perry of the Northern District of Illinois was sitting by designation.

1. Local 3489, United Steelworkers of America, AFL-CIO. Subsequently the parent international union, United Steelworkers of America, AFL-CIO, intervened as an additional defendant.

the union had failed to elect its officers by secret ballot and had imposed an unreasonable candidacy qualification, thus violating Sections 401(b) and 401(e) of the Act.[2] The district judge disagreed and dismissed the complaint. We reverse.

The membership of the Union is composed of the production and maintenance employees of the Stran Steel Corporation of Terre Haute, Indiana. At the time of the election, there were 660 members in good standing eligible to vote. However, pursuant to rules of the Local Union and its parent, the following requirements were established for eligibility for office in the Local:

1. Membership in good standing for 24 months immediately preceding the election;
2. Employment in a place within the jurisdiction of the Local Union;
3. Attendance at least at 18 of the 36 regular monthly meetings preceding the election unless union activities or working hours prevented attendance.

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2. Section 401(b) (29 U.S.C. § 481(b)) provides:

"Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing."

In pertinent part, Section 401(e) (29 U.S.C. § 481(e)) provides:

"In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof."

The third requirement was dictated by the following provision of the International Union's constitution:

"No member shall be eligible for election as a Local Union Officer or Grievance Committeeman unless

* * *

"He has attended at least one-half (½) of the regular meetings of his Local Union for thirty-six (36) months previous to the * * * election unless his Union activities or working hours prevented his attendance." (Article VII, Sec. 9.)

From June 1967 to May 1970, the Local Union conducted 36 monthly meetings, with an average attendance of 47 members per meeting. As a result of the meeting attendance rule, 96.5% of the Local Union's membership was ineligible to hold office. Ten of the 23 members who were found eligible were incumbent office holders. Following the May 17, 1970, nomination meeting, two of the nominees were informed that they were ineligible for union office because they had attended an insufficient number of union meetings. Ultimately, there were only 13 candidates on the ballot running for ten offices and six of these candidates ran unopposed.

After the June 22, 1970, election of officers, Bernard Frye,[3] a defeated candidate for the presidency, filed a

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3. Frye was ultimately elected president of the Local Union on June 12, 1973, and at the time of the filing of the briefs here was serving in that capacity. Although neither party has raised the question of moot-

protest with the Local Union, claiming that the meeting attendance rule was unreasonable and that the vote had not been by secret ballot. The Union denied his protest and he appealed to the International Union's executive Board. Because his protest was not acted upon by the Executive Board within three months (29 U.S.C. § 482 (a)(2)), Frye filed a written complaint with the Secretary of Labor, prompting the present litigation.

The district court filed an unreported memorandum opinion in favor of defendants. In its opinion, the court stated:

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ness on appeal or in the court below, the mere recitation of the fact that the complainant as to the 1970 election eventually won the office which he sought then and is now serving in that capacity is sufficiently suggestive of mootness problems to merit a brief discussion by this Court.

In *Wirtz v. Local 153, Glass Bottle Blowers Ass'n,* 389 U.S. 463, the Supreme Court held that where the Secretary of Labor has proved a Section 401 violation that may have affected the outcome of an election, an intervening unsupervised election for the same offices does not deprive the Secretary of the right to a court order voiding the challenged election and directing that a new election be held under his supervision. There appears to be no substantial reason for distinguishing this case on the grounds that the complainant himself has secured the office in the second election that he sought in the challenged election. Thus if the June 12, 1973, election was unsupervised, this case is on all fours with *Glass Bottle Blowers* and clearly not moot. Our review of the transcript of the hearing below leads us to believe that the Secretary did not supervise the June 12, 1973, election. It is therefore unnecessary to decide whether this case would be moot if a supervised election had been held since the challenged election. See *Brennan v. Silvergate District Lodge No. 50,* 503 F.2d 800, 803-804 (9th Cir. 1974).

> "The meeting attendance qualification * * * is designed to (1) insure that candidates have demonstrated an interest in union affairs prior to election and are therefore likely to continue to do so, if elected, and (2) that candidates will, if elected, be able to more knowledgeably fulfill their duties."

Therefore, the court concluded that the meeting attendance rule was a reasonable qualification within the meaning of Section 401(e) of the Act (note 2, *supra*). The court also held that the Union's failure to provide voting booths or other means of insuring secrecy during the voting did not violate Section 401(b) of the Act (*idem*), emphasizing that "the evidence did not indicate that the lack of a voting booth [subsequently acquired by the local union] or similar apparatus for secret voting may have affected the outcome of the election."

Reasonableness of Attendance Requirement

As noted, a member of the defendant union is not eligible for election to office unless he has attended 18 of the 36 regular monthly meetings preceding the election, unless union activities or working hours prevented attendance. This requirement must be tested in light of Section 401(e) of the Act, which makes "every member in good standing" eligible for office, subject to Section 504 of the Act "and to reasonable qualifications uniformly imposed." Section 504 prohibits members of the Communist Party and persons convicted of certain crimes from holding office unless certain conditions are met (29 U.S.C. § 504). This provision is not involved in this appeal. Further narrowing the issue, the Secretary does not seriously contend that the 18 of 36 rule was not uniformly applied. Thus the question before us is whether the meeting attendance rule is a reasonable qualification. We hold that it is not.

The construction of Section 401(e) was also before us in *Brennan v. Independent Lift Truck Builders Union,* 490 F.2d 213, 217 (7th Cir. 1974). Applying the admonition in *Wirtz v. Hotel, Motel & Club Employees Union, Local 6,* 391 U.S. 492, 499, that "Congress plainly did not intend that the authorization in § 401(e) of 'reasonable qualifications uniformly imposed' should be given a broad reach," we held that it would not be a reasonable qualification to bar a member from eligibility for office where he was discharged by an employer and was actively contesting the discharge.

In *Hotel Employees,* the Supreme Court struck down a union by-law which required major office-holders to be selected from members who had previously been office-holders. To support this conclusion, the Court relied on the legislative history of Section 401(e) and its wording that "every member in good standing shall be eligible to be a candidate and to hold office * * *." In so ruling, the Court stated:

> "This conclusion is buttressed by other provisions of the Act which stress freedom of members to nominate candidates for office. Unduly restrictive candidacy qualifications can result in the abuses of entrenched leadership that the LMRDA was expressly enacted to curb. The check of democratic elections as a preventive measure is seriously impaired by candidacy qualifications which substantially deplete the ranks of those who might run in opposition to incumbents." 391 U.S. at 499.[4]

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4. Note 8 has been omitted from the foregoing quotation; it cited 29 U.S.C. §§ 481 (e) and 411(a)(1) as provisions stressing members' freedom to nominate candidates.

Later in the *Hotel Employees* opinion, Justice Brennan observed that because the objective of Title IV of the Act (29 U.S.C. §§ 481-483) is to insure free and democratic elections, it was plain that a candidacy limitation rendering 93% of union members ineligible for office "can hardly be a reasonable qualification." 391 U.S. at 502. Here the meeting attendance rule disqualified 96.5%[5] of the Local Union's membership from office, so that it cannot be deemed a reasonable qualification either. We need not decide whether the 18 of 36 rule is *per se* unreasonable because its effect of severly restricting the number of potential candidates for union office shows it to be clearly unreasonable in this case. Furthermore, we note that of the 23 persons found to be eligible for office in the 660-person Local, ten were incumbent office-holders. Since Section 401(e) was intended to curb the possibility of abuse by an entrenched leadership, whether benevolent or not,[6] a restriction that results in almost half of those eligible to be candidates in a local of this size also being incumbent office-holders is surely suspect.

No particular percentage is accorded talismanic properties under the Act, so that the courts need not hold a union rule or combination of rules that fails to qualify such an arbitrary percentage of members as potential candidates *per se* unreasonable. Rather, the entire fact situation surrounding the election is to be examined in making the reasonableness determination.

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5. Of the Union's 660 members, one member was found eligible by a combination of meeting attendance and work credits, and 22 members were eligible by virtue of meeting attendance alone. This resulted in disqualifying 96.5% of the membership at this election.

6. *Hotel Employees, supra,* at 503.

See 29 C.F.R. § 452.38 (1974). Of course, if a very high percentage of the membership is disqualified from seeking union office by a rule, as was the situation here, that fact alone may justify a finding that the rule is unreasonable. As stated by Judge Tone in *Brennan v. Local 3911, United Steelworkers of America,* 372 F.Supp. 961, 967 (N.D. Ill. 1973), in view of its decision in *Hotel Employees,* "It seems apparent that the Supreme Court would not regard the Steelworkers meeting attendance requirement in its present form as a reasonable qualification."[7]

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7. In *Local 3911,* Judge Tone rendered judgment for defendant union because the plaintiff had not fulfilled the statutory intra-union exhaustion requirements. Because of the possibility of reversal by a reviewing court, the then district judge indicated how he would have ruled had he reached the merits. Finding the Supreme Court's *Hotel Employees* decision controlling, he held that the disqualification of 94.7% of the membership due to the 18 of 36 rule proved the rule unreasonable under Section 401(e). 372 F.Supp. at 967.

This facet of the decision in *Local 3911* was cited with approval in *Brennan v. Local Union No. 639, International Brotherhood of Teamsters,* 494 F.2d 1092, 1099-1100 (D.C. Cir. 1974), where the Court of Appeals for the District of Columbia affirmed the ruling of the district court that a meeting attendance requirement, which disqualified 97% of the membership from potential candidacy, could not be applied in a coming election. The court noted, but did not follow, the contrary view expressed in *Brennan v. Local 5724, United Steelworkers of America,* 489 F.2d 884 (6th Cir. 1973). Likewise, to the extent that *Local 5724* is inconsistent with our decision here (in *Local 5724* only 84.8% were disqualified by the 18 of 36 rule), we respectfully disagree with the Sixth Circuit. *Wirtz v. Local 153, Glass Bottle Blowers Ass'n,* 405 F.2d 176 (3d Cir. 1968), on remand from the Supreme Court, 389 U.S. 463, also appears to be in conflict with the

As the district court recognized, the LMRDA "was expressly enacted to curb the abuses of entrenched leadership." The defendants' meeting attendance rule perpetuates that abuse on the facts of this case. Because of the rule, members of the defendant Local who wish to run against incumbent officers might have to plan their campaigns 18 months ahead of the triennial elections in order to acquire 18 attendance credits. The need for such long-range planning would help to keep incumbent leaders in office. Unions undoubtedly have members with the requisite skills to hold office who have been sufficiently content with the directions taken by the union leadership for a time so that they felt no need to participate in routine meetings. Yet the 18 of 36 rule could prevent such members from becoming candidates even where they had been attending all the meetings and actively opposing the policies of the incumbent officers for over a year. Moreover, new members can qualify as members in good standing after two years. However, in order to challenge incumbents, they would have to attend 18 out of 24 meetings in those two years. Again this requirement favors incumbents.

Defendants argue that the Secretary's position contradicts a provision in his manual on the Act.[8] The

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Sixth Circuit, although in *Local 153* the facts involved a 75% attendance requirement over two years that disqualified 97% of the union membership, so that it might be distinguished on both the face of the rule and its practical effect from *Local 5724.*

8. LMRDA Interpretive Manual § 422.250, which provided:

> "PARTICIPATION IN UNION AFFAIRS"
>
> "Qualifications reasonably designed to assure that candidates have participated in the affairs

short answer is that the manual is now obsolete. See 29 C.F.R. § 452.38 (1974). In any event, the meeting attendance rule at issue here disqualified a very high percentage of the membership from holding office, thus constituting "special circumstances which cast doubt upon the validity and reasonableness" of the rule within the guideline expressed in that manual.

Defendants also rely upon Section 422.206 of the same obsolete manual which provided that a two-year-50% meeting attendance requirement was not unreasonable. The Secretary has explicitly abandoned this position in a new regulation which provides that the reasonableness of a meeting attendance rule must be determined "in the light of all the circumstances of the particular case, including * * * the number or percentage of members who would be rendered ineligible by its application." 29 C.F.R. § 452.38 (1974).[9] This regulation therefore reinforces the Secretary's policy typified by the filing of this lawsuit. Moreover, since the three-year rule can be 50% harsher as to the number of meetings which a member must attend to qualify for office and as to the time limitations imposed on his decision to seek office, the reasonableness of the two-year rule does not determine the reasonableness of the three-year rule.

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of the union and are sufficiently familiar with the industry in which the union operates would not be considered unreasonable in ordinary circumstances, if uniformly imposed. In the absence of knowledge of any special circumstances which cast doubt upon the validity and reasonableness of any of the qualifications they are not to be considered unreasonable in themselves."

9. Subparagraph (b) of the same regulation summarizes several court decisions holding particular meeting attendance requirements to be unreasonable.

As in *Hotel Employees,* defendants attempt to defend their restriction by various argument in its favor. Thus they assert that they are attempting to insure that candidates have demonstrated an interest and concern in union problems and would be sufficiently familiar with them to fulfill the duties of office. Similar arguments were rejected in *Hotel Employees* where the Court noted that Congress designed Title IV "to curb the possibility of abuse by benevolent as well as malevolent entrenched leadership" (391 U.S. at 503). Defendants also assert that the meeting attendance rule fosters large turnouts at union meetings. However, according to the stipulation below, the average meeting attendance of this Union was 47 members out of 660. Such an attendance record would certainly not justify disqualifying 96.5% of members from holding office.

In the court below, the Secretary showed that only one other national union has specified a three-year period during which a member must attend a specified number of meetings to qualify for candidacy. Surely this statistic belies defendants' claim that the rule in question is necessary to assure competent union leadership. The right of members to nominate and vote for candidates of their choice (29 U.S.C. §§ 411(a)(1) and 401(e)) would be seriously diluted if this rule were to be sanctioned. In our view, it is not a "reasonable qualification" for office under Section 401(e) of the Act.

Maintenance of Secret Ballot

The Secretary also argues that this election should be set aside and a new supervised election ordered under Section 402(c) of the Act (29 U.S.C. § 482(c))

on the additional ground that this Local Union failed to elect its officers by secret ballot in violation of Section 401(b) of the Act (note 2, *supra*). As defined in Section 3(k) of the Act:

> " 'Secret ballot' means the expression by ballot, voting machine, or otherwise, but in no event by proxy, of a choice with respect to any election * * * which is cast in such a manner that the person expressing such choice *cannot be* identified with the choice expressed." (Emphasis added. 29 U.S.C. § 402(k).)

Under these statutory provisions, unions must run elections that conform to the democratic principles embodied in the secret ballot mandate. *Wirtz v. Local 153, Glass Bottle Blowers Ass'n, supra* note 1, at 471-472.

This election was conducted in a 60' x 20' room. Several small adjacent rooms were not used, although available. A small table for marking ballots was placed three feet in front of an elevated officers' bench. Two members of the Election Committee were present throughout the 6:00 a.m. to 6:00 p.m. election. Most of the voting occurred during the last two hours of the day, when the voters were "jammed together * * * elbow to elbow." Up to 50 voters were in the room at one time. Many voters marked their ballots at the aforesaid table and could see each other's ballots as they were marked. Others marked their ballots against the walls, and their markings could also be observed by voters several feet away. No one was seen carrying a ballot to the back of the hall to vote, and some members deliberately "flaunted their votes." There was no encouragement of any members to take steps to prevent others from seeing their ballots. Such loose polling procedures

violate the secret ballot requirement of the Act. *Hodgson v. United Mine Workers of America,* 344 F.Supp. 17, 30 (D.D.C. 1972). There was no observation of the requirement of Section 3(k) that votes be cast in such a manner that "the person expressing [his] choice cannot be identified with the choice expressed."

Defendants claim that the Secretary's position with respect to ballot secrecy is inconsistent with his regulation on the subject. 29 C.F.R. § 452.97(a) (1774) provides:

> "A prime requisite of elections regulated by Title IV is that they be held by secret ballot among the members or in appropriate cases by representatives who themselves have been elected by secret ballot among the members. A secret ballot under the Act is 'the expression by ballot, voting machine, or otherwise, but in no event by proxy, of a choice * * * cast in such a manner that the person expressing such choice cannot be identified with the choice expressed.' [Quoting 29 U.S.C. § 402(k).] Secrecy may be assured by the use of voting machines or, if paper ballots are used, by providing voting booths, partitions, or other physical arrangements permitting privacy for the voter while he is making his ballot. The ballot must not contain any marking which upon examination would enable one to identify it with the voter. Balloting by mail presents special problems in assuring secrecy. Although no particular method of assuring such secrecy is prescribed, secrecy may be assured by the use of a double envelope system for return of the voted ballots with the necessary voter identification appearing only on the outer envelope."

On analysis, it is apparent that under this regulation a voting booth "or other physical arrangements permitting privacy for the voter" may be used to assure the secrecy of the ballot, but secrecy must be assured. Since the use of the secret ballot is mandatory and not optional, the arrangements for voting at the June 1970 election satisfy neither the statute nor the regulation.

Defendants' argument that every voter had an opportunity to make his ballot secret by going to an unpopulated area within the large room or to one of the small rooms or by guarding his vote from observation must fail. But see *Shultz v. Local 420, Aluminum Workers,* 74 LRRM 2281 (N.D. N.Y. 1970). The statutory mandate is for a vote that "cannot" be identified with the voter. In many cases, requiring a union member to make a great show of securing his secrecy may be tantamount to indicating his vote. The Act requires a mandatory secret ballot, not one permitting a voter to mark his ballot in secret with the danger of identification implicit in securing that secrecy.

In rejecting the Secretary's claim that the secret ballot requirement of the Act had not been observed, the district judge was especially motivated by the fact that "the evidence did not indicate that the lack of a voting booth or similar apparatus for secret voting may have affected the outcome of the election."[10] This was contrary to the holding in *Hotel Employees* that once a violation is established by a preponderance of the evidence, a *prima facie* case has been made that the outcome of

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10. Section 402(c) of the Act requires a new, supervised election if a violation of Section 401 (note 2 *supra*) "may have affected the outcome of an election" (29 U.S.C. § 482(c)).

the election was affected. See 391 U.S. at 505-509. According to our reading of the record, these defendants did not meet that *prima facie* case.

Fed. R. Civ. P. 52(a) provides that a district court's fact findings cannot be reversed on appeal unless found to be clearly erroneous. While this Court reverses the judgment of the court below, it is not necessary to hold any of the district judge's findings clearly erroneous. The basis for the reversal is legal rather than factual. Thus we accept both the district court's endorsement of the parties' stipulation and the facts as found by the district court after the hearing. We are overturning only the legal conclusions that the candidacy restriction was reasonable and that there was a secret ballot within the meaning of the Act.

The order of the district court is reversed with directions to enter judgment for the Secretary.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

August 5, 1975
Before
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. JOSEPH SAM PERRY, Senior District Judge*
No. 74-1639

PETER J. BRENNAN, Secretary of Labor, Plaintiff-Appellant, v. LOCAL 3489, UNITED STEELWORKERS OF AMERICA, AFL-CIO, and UNITED STEELWORKERS OF AMERICA, AFL-CIO, Defendants-Appellees.	No. TH 70 C 117

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division, James E. Noland, Judge

Opinion by Judge Cummings

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Terre Haute Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, in accordance with the opinion of this court filed this date.

*Senior District Judge Joseph Sam Perry of the Northern District of Illinois is sitting by designation.

Appendix.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

PETER J. BRENNAN, Secretary of Labor, United States Department of Labor [Successor to James D. Hodgson, Resigned] v. LOCAL 3489, UNITED STEELWORKERS OF AMERICA, AFL-CIO and UNITED STEELWORKERS OF AMERICA, AFL-CIO	NO. TH 70-C-117

Memorandum Opinion

Plaintiff, the Secretary of the United States Department of Labor, instituted this action under Title IV of the Labor-Management Reporting and Disclosure Act (LMRDA) 29 U.D.C. § 401 *et seq.* The Court has jurisdiction over this action under 29 U.S.C. 482(b). The Secretary sought a judgment declaring the nominations and election conducted by defendant Local 3489, United Steelworkers of America, AFL-CIO, on May 17 and June 22, 1970, to be null and void, and directing that a new election be conducted for all offices of defendant Local under supervision of the Secretary of Labor. For the reasons stated herein, we find the requested relief to be unwarranted.

Local 3489 is an unincorporated association maintaining its principal office at 625 North 13th Street, Terre Haute, Indiana. The Local consisted in June 1970

of approximately 660 members employed by the Stran Steel Corporation at its Terre Haute plant. Local 3489 is, and at all times relevant to this action has been, chartered by and subordinate to the defendant United Steelworkers of America, AFL-CIO, an international labor organization engaged in an industry affecting commerce within the meaning of the Act.

Following the election of June 22, 1970, Bernard Frye, a member in good standing who had been nominated for the presidency, protested the nominating and election procedures to the Local and International. Subsequently on September 24, 1970, he filed a complaint with the Secretary of Labor asserting the same objections. Mr. Frye is currently president of the Local as the result of the June 1973 election. On the basis of Mr. Frye's complaint, the Secretary filed this action on November 23, 1970, pursuant to 29 U.S.C. 482.

The Secretary asserts that the nominating procedure employed by the Local violated Section 401(e) of the LMRDA, 29 U.S.C. 481(e)[1] in that through the imposition of an unreasonable candidacy requirement members in good standing were denied the right to be candidates for local union office and to support the candidates of their choice. The challenged candidacy require-

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1. Section 401(e) provides in pertinent part that:

"(e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to Section 504 of this title and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice. . . ."

ment is contained in Article VII, Section 9 of the International Constitution and provides in pertinent part that:

"No member shall be eligible for election as a Local Union officer or Grievance Committeeman unless

* * *

(c) He has attended at least one-half (½) of the regular meetings of his Local Union for thirty-six (36) months previous to the June 1970, election, unless his Union activities or working hours prevented his attendance."

The Secretary also asserts that Local 3489 by its failure to provide voting booths or other means of insuring secrecy during the voting process, violated Section 401(b) of the LMRDA, 29 U.S.C. 481(b).[2]

Prior to the May 17 nominations the Local's Recording Secretary compiled a list of the names of 22 members eligible to hold local office. Of these, 10 were incumbent officers. Following the May 17 meeting, two of the members subsequently nominated were informed that they were ineligible for union office because they had attended an insufficient number of meetings.

It is the Secretary's position that a candidacy requirement under which in excess of 90% of the Local's members are ineligible for office is *per se* unreasonable under the Supreme Court's interpretation in *Wirtz v. Hotel, Motel & Club Employees Union, Local 6*, 391 U.S.

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2. Section 401(b) provides that:

"(b) Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing."

492 (1968) of the "reasonable qualifications uniformly imposed" provision contained in Section 401(e).

Hotel Employees focused on a candidacy qualification which the Supreme Court characterized as "virtually unique in trade union practice." 391 U.S. at 505. The qualification then in question limited eligibility for major local union offices to union members who had previously held union elective office. The practical effect of this requirement was to restrict eligibility for office to those members who had the blessing of the entrenched administration party. The Court observed that the LMRDA was expressly enacted to curb the abuses of entrenched leadership, and in view of the practical effect of the restriction found the qualification unreasonable.

It is clear to the Court that the meeting attendance rule in the instant case stands upon an altogether different footing than did the previous office restriction considered in *Hotel Employees*. In *Hotel Employees* the control over qualification or disqualification of candidates was in the hands of an entrenched union leadership. Under the meeting attendance rule it is left to each member to decide whether or not he will qualify himself for union office by giving less than two hours of his time each month to union activity. Application of a strict percentage rule in determining the reasonableness of any given qualification does not distinguish between candidacy restrictions imposed by union leadership and restrictions brought about by the individual members. Further, the previous office qualification bears no necessary relationship to fitness for office. The meeting attendance qualification on the other hand is designed to (1) insure that candidates have demonstrated an interest in union affairs prior to election and are

therefore likely to continue to do so, if elected, and (2) that candidates will, if elected, be able to more knowledgeably fulfill their duties.

Based upon the foregoing, the Court concludes, as it has been concluded in the past by this Court and others, that the Steelworkers' meeting attendance rule is a reasonable qualification within the meaning of Section 401(e) of the LMRDA. *Brennan v. Local 5724, United Steelworkers of America,* 489 F.2d 884 (6th Cir. 1973); *Shultz v. Local Union 6799,* 71 LRRM 2830 (C.D. Cal. 1969), aff'd on other grounds, 426 F.2d 969 (9th Cir. 1970), aff'd sub nom., *Hodgson v. Local 6799, United Steelworkers of America,* 403 U.S. 333 (1971); *Shultz v. Local 1299, United Steelworkers of America,* 324 F.Supp. 750 (E.D. Mich. 1970), aff'd in part, sub nom., *Hodgson v. Local 1299, United Steelworkers of America,* 453 F.2d 565 (6th Cir. 1971); *Shultz v. Local 1150, United Steelworkers of America,* 75 LRRM 2869 (S.D. Ind. 1970), vacated on other grounds (No. 71-1467, 7th Cir. July 1971, unreported).

With respect to the Secretary's allegation that the election held on June 22, 1970 did not fulfill the secret ballot requirement contained in Section 401(b) of the LMRDA, the evidence at trial disclosed that in fact ample opportunity was given to the union members to vote in secret. The Union hall contained three rooms available for balloting. The largest of these, twenty by sixty feet in size, contained sixty to one hundred chairs and four tables available for marking ballots. A large amount of wall space could also have been used. Indeed there is nothing to indicate that voters could not have left the hall to mark their ballots as no restriction was placed upon them once they received their ballots. The

ballots themselves were small and could have been shielded by the voter's arm. From the evidence it appears that the balloting on June 22, 1970, was approximately as secret as it could have been made by the voting booth subsequently acquired by the Local. Most importantly, however, the evidence did not indicate that the lack of a voting booth or similar apparatus for secret voting may have affected the outcome of the election.

On the basis of the foregoing, the Court concludes that the requested relief is unwarranted. Judgment is now entered in favor of the defendants and against the plaintiff.

Findings of Fact and conclusions of law have not been separately stated, but are included in the body of the foregoing opinion in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Plaintiff's complaint is DISMISSED.

JAMES E. NOLAND
James E. Noland,
U. S. District Judge

DATE: April 30, 1974

No. 73-1171
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETER J. BRENNEN,
Secretary of Labor,
Plaintiff-Appellant,
v.
LOCAL 5724, UNITED STEELWORKERS OF AMERICA, AFL-CIO, and UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Defendants-Appellees.

APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed December 19, 1973.

Before PHILLIPS, Chief Judge, and PECK and LIVELY, Circuit Judges.

PHILLIPS, Chief Judge. A United Steelworkers' rule provides that no member shall be eligible for election to a local union office unless he has attended at least one-half of the regular meetings of his local union during the previous 36 months. The issue presented on this appeal is whether this attendance requirement is a reasonable qualification uniformly imposed within the meaning of the Labor-Management Reporting & Disclosure Act of 1959, 29 U.S.C. § 481(e).[1]

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1. 29 U.S.C. § 481(e) provides in part:
"In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject

District Judge Joseph P. Kinneary held the rule to be valid. We affirm.

The Secretary of Labor filed this action challenging as null and void a Union election held in June 1967 by Local Union 5724, United Steelworkers of America, and seeking to have a new election conducted under his supervision. Jurisdiction is based upon 29 U.S.C. § 482.[2]

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to section 504 and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. * * * The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this subchapter."

2. Section 402, 29 U.S.C. § 482, authorizes the Secretary of Labor to file suit to remedy any violation of § 401 if certain conditions have been met:

(a) A member of a labor organization—

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation, may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 481 of this title . . . .

(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this sub-chapter has occurred and has not been remedied, he shall, within sixty days after filing of such complaint, bring a civil action against the labor organization . . . to set aside the invalid election, if any, and to direct the conduct of an election . . . under the supervision of the Secretary. . . .

The Union attendance rule, imposed by Article VII, § 9, of the International Steelworkers' Constitution, in relevant part is as follows:

> "No member shall be eligible for election as a Local Union Officer or Grievance Committeeman unless
>
> * * *
>
> "(c) He has attended at least one-half (½) of the regular meetings of his Local Union for thirty-six (36) months previous to the June, 1967, election, unless his Union activities or working hours prevented his attendance."

The facts are largely undisputed. In June 1967, Local 5724 had approximately 1,700 members comprised exclusively of production and maintenance employees at the Ormet Corporation plant in Hannibal, Ohio. The plant operated in shifts. About 800 employees worked the day shift (8 a.m. to 4 p.m.), but only about 439 of these employees were permanently assigned to this shift. Approximately 430 employees worked the 4 p.m. to 12 p.m. shift, 88 of whom were permanently assigned. About 370 employees worked from midnight to 8 a.m., and of these, 33 were permanently assigned to this night shift. Those employees who were not permanently assigned to a particular shift were rotated from one shift to another.

(c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds—

* * *

(2) that the violation of section 481 of this title may have affected the outcome of an election, the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary . . . .

Local 5724 held regular meetings according to a set schedule at 4:30 p.m. on the second Thursday of each month at a union hall located in Clarington, Ohio. The union hall was eight miles from the plant and could be reached in a 15 minute automobile ride from the plant. The average length of each meeting was about two hours. For the 36 monthly meetings between June 1964 and May 1967, attendance varied from 11 to 117 members, with an average attendance of 45.

At the meeting on May 11, 1967, there were 42 nominations for nine local union offices. Nine of the nominations were declined. An election committee then determined whether the remaining 33 nominees were eligible for office. Under the International Constitution of the Steelworkers, there were three requirements for eligibility to run for and hold local union office; the member must (1) have been in continuous good standing for a period of 24 months immediately preceding the election, (2) have been employed in a plant or mill or other place within the jurisdiction of the local union, and (3) have attended at least 18 of the regular monthly meetings in the 36 months preceding the June 1967 election, unless his union activities or working hours excused his attendance. Since these requirements were a part of the Steelworkers' International Constitution, they were binding on all 3,700 local unions chartered by the International Union in 1967.

Although none of the 33 nominees was disqualified on account of the first two requirements, nine nominees were declared ineligible to seek office because of their failure to satisfy the meeting attendance rule. Of the 24 qualifying candidates, 19 had attended 18 or more of the previous 36 meetings and five more qualified as candi-

dates by combining attendance with excused absences. As a result of the disqualifications pursuant to the meeting attendance rule, the nominees for recording secretary, treasurer and guide ran unopposed.

After the election, James Hutson, a nominee for President who had been declared ineligible under the meeting attendance rule, filed a timely written protest with the Local in which he contested the reasonableness of the rule. Hutson had attended 11 of the 36 meetings preceding the election and had no excused absences because he was permanently assigned to the day shift. When Local 5724 denied his protest, Hutson appealed to the International Union's Executive Board, but that body also denied his protest. Having thus exhausted his internal union remedies, as required by § 402(a) of the Act, 29 U.S.C. § 482(a), Hutson filed a timely complaint with the Secretary.

After the investigation required by § 402(b) of the Act, 29 U.S.C. § 482(b), the Secretary then commenced this action against Local 5724. The International Union intervened as a defendant.

The District Judge conducted an evidentiary hearing as to the purposes of the Steelworkers' meeting attendance rule and concluded that it was intended to accomplish legitimate union goals. Accordingly, the District Judge held that the rule was not an "unreasonable qualification" for candidacy for local union office and that the rule was "uniformly and fairly applied" to each member of Local 5724 in the disputed election. For the reasons set out below, we agree with the decision of the District Court.

We are cited to no decision of the Supreme Court or any Court of Appeals deciding the question of whether

the Steelworkers' attendance rule is a "reasonable qualification uniformly imposed" within the meaning of the statute. Three District Courts have sustained the rule. See, *Shultz v. Local Union 6799, United Steelworkers of America,* 71 LRRM 2830 (C.D. Cal. 1969), *aff'd on other grounds,* 426 F.2d 969 (9th Cir. 1970), *aff'd sub nom., Hodgson v. Local 6799, United Steelworkers of America,* 403 U.S. 333 (1971); *Shultz v. Local 1299, United Steelworkers of America,* 324 F.Supp. 750 (E.D. Mich. 1970), *aff'd in part, sub nom., Hodgson v. Local 1299, United Steelworkers of America,* 453 F.2d 565 (6th Cir. 1971); *Shultz v. Local 1150, United Steelworkers of America,* 75 LRRM 2869 (S.D. Ind. 1970), *vacated on other grounds* (No. 71-1467, 7th Cir., July 1971, unreported). On the other hand, one District Court in dicta has expressed the view that the Steelworkers' rule did not constitute a reasonable qualification for eligibility for office holding, *Brennan v. Local 3911, United Steelworkers of America,* Nos. 71-C-74 (N.D. Ill., March 16, 1973).

The reason why no Court of Appeals has yet reviewed the validity of the Steelworkers' rule is because in each of the above cases the union member or members who protested the conduct of an election failed to raise the question of the legality of the rule during the course of the internal union procedure and thus did not satisfy the exhaustion requirement set forth in § 402(a) of the Act, 29 U.S.C. § 482(a).[3]

The Supreme Court determined in *Hodgson v. Local Union 6799, United Steelworkers of America, supra,* 403

3. For a text of the exhaustion requirement contained in § 402(a) of the Act, 29 U.S.C. § 482(a), see n. 2.

U.S. 333 (1971), that the failure to exhaust internal union remedies precluded the Secretary from filing suit to challenge the validity of the rule. Accordingly, the Supreme Court in *Local 6799* expressly left unanswered the issue of whether the Steelworkers' rule was reasonable. 403 U.S. at 341. Subsequently, this court found it "unnecessary . . . to reach" the merits of the Steelworkers' rule in *Hodgson v. Local 1299, United Steelworkers of America,* 453 F.2d 565, 575 (6th Cir. 1971).

In the present case the parties stipulated and the District Court found that union member Hutson, a nominee for President of Local 5724, after being declared ineligible for failing to satisfy the meeting attendance rule, thereafter attacked the validity of the rule throughout the course of his timely internal protest first to the Local and then to the International Union. Thus the validity of the Steelworkers' rule is properly before the court in this action.

In determining the reasonableness of the meeting attendance rule, we are guided by the purpose of the Labor-Management Reporting and Disclosure Act of 1959. The Supreme Court has stated the spirit of the Act as follows: "Title IV's special function in furthering the overall goals of the LMRDA is to insure 'free and democratic' elections." *Wirtz v. Local 153, Glass Bottle Blowers Assn.,* 389 U.S. 463, 470 (1968). Section 401(e) of the Act serves this function by prohibiting candidacy requirements which are not "reasonable qualifications uniformly imposed."

In interpreting the "reasonable qualifications uniformly imposed" provision, the Supreme Court has announced the rule that § 401(e) is to be strictly construed.

In *Wirtz v. Hotel, Motel and Club Employees Union, Local 6*, 391 U.S. 492, 499 (1968), the Court stated:

> "Congress plainly did not intend that the authorization in 401(e) of 'reasonable qualifications uniformly imposed' should be given a broad reach. The contrary is implicit in the legislative history of the section and in its wording that 'every member in good standing shall be eligible to be a candidate and to hold office . . . .' This conclusion is buttressed by other provisions of the Act which stress freedom of members to nominate candidates for office. Unduly restrictive candidacy qualifications can result in the abuses of entrenched leadership that the LMRDA was expressly enacted to curb. The check of democratic elections as a preventive measure is seriously impaired by candidacy qualifications which substantially deplete the ranks of those who might run in opposition to incumbents. [footnote omitted.]"

The Secretary first contends that the meeting attendance rule is per se unreasonable because it bars more than 80 per cent of the members of Local 5724 from running for or holding office. The Secretary relies on *Hotel Employees, supra*, and *Hodgson v. Local Unions 18, International Union of Operatiny Engineers*, 440 F.2d 485, (6th Cir.), *cert. denied*, 404 U.S. 852 (1971).

The restriction at issue in *Hotel Employees* limited eligibility for maior elective offices to members who had previously held office. In striking down this requirement, the Supreme Court looked to its practical impact:

> "Plainly, given the objective of Title IV, a candidacy limitation which renders 93% of union members ineligible for office can hardly be a 'reasonable qualification.'" [391 U.S. at 502.]

While 93 per cent was held plainly unreasonable, the Supreme Court did not indicate the maximum permissible percentage of members that could be barred by a reasonable rule.

To answer this question, the Secretary turned to this court's opinion in *Local Unions 18, supra*. The rule at issue in that case required that candidates belong to a parent local rather than a branch local. After finding that this rule precluded over 60 per cent of the union members from holding office, this court concluded that the rule was "manifestly unreasonable," particularly because there was no relationship between the rule and a member's fitness for office. 440 F.2d at 487.

On the basis of *Hotel Employees* and *Local Unions 18*, the Secretary contends that the Steelworkers' rule is unreasonable because only 1.4 per cent of Local 5724's members had attended the necessary 18 of 36 meetings, and when excused absences were included, only 6.9 per cent were eligible to be candidates. This would leave 93.1 per cent of Local 5724's membership disqualified by the meeting attendance rule, but the Secretary acknowledges that this figure may be reduced to as low as 84.8 per cent once certain other credits for work conflicts are considered.

On the other hand, the Steelworkers argue that (1) the effect of the rule is not the touchstone for determining its reasonableness, (2) the Secretary's per se theory rests on an incorrect interpretation of *Hotel Employees* and *Local Unions 18* and (3) the Secretary's argument here is contrary to his published position as set forth in his Interpretative Manual. We agree with the Steelworkers' position.

To satisfy the minimum requirements of the Steelworkers' rule, all that any member had to do was to devote approximately two hours to union affairs every other month during the three year period between elections. The obligation thus imposed on a member was to spend thirty-six hours at union meetings every three years. Further, it should be emphasized that the meetings followed a set pattern. They were conducted on the second Thursday of each month and were scheduled at the most desirable time for purposes of accommodating a majority of the members (30 minutes after the day shift ended). In addition, the meeting hall was conveniently located within a fifteen minute automobile drive from the plant.

Assuming the accuracy of the Secretary's mathematical computations that 84 to 93 per cent of Local 5724's members were disqualified from seeking office in the 1967 election, this is largely the fault of the union members themselves. Since the union meetings were held according to a set pattern and at a convenient location, the real cause of the large scale disqualifications is not the per se existence of the Steelworkers' rule but the failure of union members to attend the meetings.

Not only does the Secretary mistakenly fail to look to the real cause of the disqualifications here, but he also misinterprets the Supreme Court's decision in *Hotel Employees* and our decision in *Local Unions 18*. The Supreme Court in *Hotel Employees* noted that only seven per cent of the members satisfied the "prior office holding" requirement; that many of these had been appointed by the incumbents to fill vacancies, thus "enabl[ing] the incumbent group to qualify members for elective office by a practice not available to dissidents;"

and that in practice, endorsement by the incumbent group was necessary to get elected to lower office, thus making it impossible for dissidents ever to qualify to run for higher office. 391 U.S. at 505. The Court finally declared that "control by incumbents through devices which operate in the manner of this bylaw is precisely what Congress legislated against in the LMRDA." 391 U.S. at 505.

This legislative objective is not thwarted by the Steelworkers' meeting attendance rule. Unlike the *Hotel Employees'* bylaw, the Steelworkers' rule disqualifies no one. Every member can qualify by the relatively unburdensome step of devoting a few hours per month to the affairs of his Union. Steelworkers disqualify themselves as a matter of free choice by their unwillingness to devote a few hours per month to Union affairs. Because of this, as the District Court expressly held in *Local 6799, supra,* 71 LRRM at 2823, every member could have qualified merely by attending one-half of the meetings.[4]

The self-evident restrictive character of the "prior office holding" rule, when accompanied by the numerical effect of drastically limiting the number of eligible candidates for office, justifies the result in *Hotel Employees*. It is, however, erroneous to conclude, as the Secretary contends, that *Hotel Employees* commands blind adherence to a per se theory even where, as here, the rule does not by itself disqualify anyone and, as will be shown below, does serve legitimate union objectives.

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4. In addition, as will be more fully noted *infra,* the Steelworkers' rule fosters the objectives of the Act, inter alia, in that by requiring dissidents to attend local union meetings it assures that incumbents cannot administer the union's affairs in an uncontrolled, arbitrary manner.

The Secretary's reliance on this court's decision in *Local Unions 18* is also misplaced. The candidacy rule in that case was drastically different from the Steelworkers' meeting attendance rule. Local 18 was divided into a parent and three sub-locals. Members of all four subdivisions were members in good standing of Local 18. The problem was that only members of the parent local were eligible to run for office and, in turn, this meant that members of the sub-locals who desired to run for local union office had to pay an additional $75 to $90 to satisfy the parent local initiation fee. 440 F.2d at 486-87.

In a bare statistical sense, this resulted in over 60 per cent of Local 18's entire membership being precluded from seeking office. This court invalidated the election in *Local Unions 18,* on the following two-fold reasoning: the union had applied a rule which (1) placed a price tag on a member's right to run for office; and (2) had no bearing on the member's fitness to hold office. 440 F.2d at 487-88. These deficiencies were deemed to be antithetical to the policies of LMRDA. The fact that the Union rule also had the effect of precluding a certain percentage of members, there 60 per cent, from running for office was plainly not the basis of the reasoning of this court.

We believe that the Steelworkers' rule has a direct, substantial relationship to fitness to hold office in that participation in union meetings is one indicia of interest in union affairs. Further, it does not place any price tag on the right to be a candidate. As such, the rationale of *Local Unions 18* does not support the Secretary's position here.

Further, the position of the Secretary is not consistent with relevant provisions of his own published LMRDA Interpretative Manual.[5] The Manual generally supports qualifications designed to assure that candidates have participated in Union affairs and specifically sanctions 50 per cent attendance requirements over one and two year periods. It is difficult for us to see any significant difference for a meeting attendance requirement covering a period of three years. These regulations, although later amended by the Secretary, were in effect when the dispute here arose.

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5. The following are excerpts from the LMRDA Interpretative Manual:

"422.250 PARTICIPATION IN UNION AFFAIRS

Qualifications reasonably designed to assure that candidates have participated in the affairs of the union and are sufficiently familiar with the industry in which the union operates, would not be considered unreasonable in ordinary circumstances, if uniformly imposed. In the absence of knowledge of any special circumstances which cast doubt upon the validity and reasonableness of any of the qualifications they are not to be considered unreasonable in themselves.

"422.205 ATTENDANCE AT 6 OF 12 UNION MEETINGS MAY BE REASONABLE

A provision requiring that to be eligible as a candidate for office a member must attend six out of twelve meetings during the year, if applied fairly and uniformly to all members, would not in ordinary circumstances, be an unreasonable qualification of the right to be a candidate for union office, within the meaning of section 401(e) of the Act.

"422.206 12 OF 24 MEETINGS MAY BE REASONABLE

A provision requiring a member to have attended at least one-half of the regular meetings of

The Secretary's second main contention is that the Steelworkers' rule is unreasonable because of alleged disproportionate effects on (1) potential insurgents, (2) new members and (3) night shift workers. Although the Secretary stipulates that the Steelworkers' rule is uniformly imposed in the sense that it applies to all locals and all members, he argues that its practical impact is not uniform for all categories of members and that this lack of uniform imposition demonstrates its unreasonableness. He argues that potential insurgents do not know three years in advance that they may challenge union incumbents, that the rule hampers new members from running for office, and that the meeting time (4:30 p.m.) effectively prevents night shift workers from attending because it occurs midway between the end of one shift (8 a.m.) and the beginning of another (midnight).

We are unpersuaded by the Secretary's arguments in this regard whether they go to the reasonableness of the rule or to its uniform imposition. In our opinion, valid reasons exist, wholly apart from the meeting attendance rule in question, for requiring potential insurgents and new members to attend a minimum number of meetings before running for office, inter alia, to provide some assurance that nominees for office will have demonstrated their willingness to comply with fundamental obligations to their Union for a reasonable period

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his local union for 24 months previous to the election before he may be eligible to hold office, is not unreasonable if it is applied fairly and uniformly to all members.

It might well be unreasonable, however, in circumstances in which attendance presented an unusual degree of difficulty for a significant proportion of the membership; as for example, where the local had an extensive geographical jurisdiction."

of time. Further, the Secretary has made no showing that the 4:30 p.m. meeting time imposed an undue hardship on the 33 employees permanently assigned to the midnight to 8 a.m. shift or the 340 employees working that shift on a rotating schedule. Union meetings were held only once a month and night shift workers could have attended the 4:30 p.m. meetings if they had desired to do so.

Finally, the Secretary contends that the purported justifications for the rule are imperceptibly small or can be served by less restrictive alternatives. We find this argument equally unpersuasive.

The District Judge conducted an evidentiary hearing limited to the purposes of the Steelworkers' rule. His conclusion of fact was that the rule was adopted for the following three reasons.[6]

"(1) To encourage broad base participation in the affairs of the union, and to obtain as large a turnout as possible at the meetings at which the union's business is conducted.

"(2) To attempt to assure that candidates have demonstrated an interest in and are likely to be concerned with the problems of the union.

"(3) To attempt to insure that candidates have participated in the affairs of the union and are, therefore, sufficiently familiar with its problems to be able more intelligently to fulfill the numerous responsibilities and duties attendant to holding office."

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6. The Steelworkers suggest a fourth reason for the rule, to wit: to insure that those who are in the opposition will come to Union meetings in order to keep ripe their right to run against the local Union leadership.

On the basis of this evidentiary hearing, the District Judge concluded that the purpose of the Steelworker's rule was as follows:

> "[T]o accomplish legitimate union goals; namely, to provide a constant check upon the growth of unbridled control of the local's affairs by incumbent officers, as well as to provide a means of familiarizing rank and file members of that which is entailed in the management of the local's affairs.' *Shultz v. Local 1299, United Steelworkers of Amer., supra* at p. 756; *see also Shultz v. Local 1150, Steelworkers, supra* at p. 2877."

The Secretary's argument gives us no basis on which to conclude that the findings of fact of the District Judge are clearly erroneous, Fed. R. Civ. P. 52(a), or that the District Judge erred in concluding that the Steelworkers' rule was designed to "accomplish legitimate union goals."

We, therefore, hold that the Steelworkers' meeting attendance requirement for candidacy for local union office is a "reasonable qualification uniformly imposed" under the facts and circumstances of this case.

Affirmed.